

IN THE HIGH COURT OF DELHI

W.P.(C) No. 5712/2003

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Decided On : October 11, 2004

The Management of M/s.
Delhi Transport Corporation

..Petitioner
through : Ms. Arati Mahajan,
Advocate.

vs.

Sh. Krishan Chander & Anr.

..Respondents
through : Mr. H.K. Chaturvedi,
Advocate.

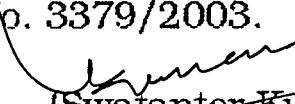
Coram :**Hon'ble Mr. Justice Swatanter Kumar**

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not?
- (3) Whether the judgment should be reported in the Digest ?

Swatanter Kumar, J. (Oral)

For orders see, W.P.(C) No. 3379/2003.

October 11, 2004
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(Swatanter Kumar)
Judge

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Decided On : October 11, 2004

Sh. Krishan Chander

..Petitioner
through: Mr. H.K. Chaturvedi,
Advocate.

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Delhi Transport Corporation & Anr.

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Swatanter Kumar, J. (Oral)

1. By this judgment I would dispose of two writ petitions being W.P. (C) No. 3379/2003 and W.P. (C) No. 5712/2003. The first writ petition has been filed by the workman under Article 226-227 of the Constitution of India, praying for issuance of an appropriate writ/direction to the respondent-Delhi Transport Corporation to grant him reinstatement with consequential benefits after rejection of the application filed by the Corporation under Section 33(2) (b) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') vide order dated 23rd October, 2002, while in

the latter the Corporation challenges the correctness of the order passed by the learned Industrial Tribunal dated 23rd October, 2002. As both these petitions arise from one and the same award, it will be appropriate to dispose of both these petitions by a common judgment.

2. Before examining the merits or otherwise of the contentions raised before me during the course of hearing, it will be useful to refer to the facts giving rise to the present petition.

3. Workman-Krishan Chander was working as a driver with Delhi Transport Corporation. He was served with charge-sheet on 25th October, 1991 with the allegations that he availed 40 days leave without pay during the period between 1.1.1991 to 30.6.1991. A domestic enquiry, in accordance with the rules, was conducted against the workman, upon conclusion of which a show cause notice was served upon the workman on 24th November, 1992. Finally, an order of punishment removing the workman from service of the Corporation was passed on 7th January, 1993. Thereafter the Corporation applied for approval of the action

under Section 33(2) (b) of the Act. The learned Industrial Tribunal, Karkardoma Courts, Delhi, after recording the evidence, vide order dated 23rd October, 2002, declined to approve the action of the respondent-Corporation and rejected its application giving rise to filing of the present writ petition by the Corporation. As already noticed above, the workman claims consequential enforcement of the order by way of reinstatement with full back wages.

4. At the very outset of the arguments the learned Counsel appearing for the Corporation submits that the petitioner has already been taken back into service, of course, subject to the final determination of these writ petitions.

5. The learned Industrial Tribunal declined the approval holding that the absence of the petitioner for five days unauthorisedly without application, inclusive of 40 days leave without pay, was not a misconduct within the meaning of para 19(f)(h)(m) of the standing orders governing the conduct of Corporation employees. Vide order dated 22nd November, 2000 a preliminary issue was framed by the

Labour Court which reads as under:-

"Whether the applicant held a legal and valid enquiry against the respondent according to principles of natural justice?"

6. This issue was answered in favour of the workman and against the Corporation by holding that the enquiry was not fair and proper. After passing of the above order, on both the issues in regard to misconduct by the employee as well as whether there was compliance to the provisions of Section 33(2)(b) of the Act by payment of one month's wages, the first part was answered against the Corporation while the latter was answered in favour of the Corporation. The findings recorded by the Industrial Tribunal on issue no.1 read as under:-

"ISSUE NO.1

To prove its case the applicant produced AW-1 Sh. V.K. Palta who entered into the witness box and filed his affidavit Ex. AW1/1. He relied upon the documents Ex. AW1/A to Ex. AW1/E. He was cross examined at length. The relevant portion of cross examination is reproduced as under:

"However the period of 40 days was treated as period of leave without pay and it was so treated even before the issuance of the

chargesheet. ...I was competent to treat the period as leave without pay and in that capacity I sanctioned leave without pay for 40 days to the respondent."

8. On the other hand respondent did not lead any evidence in view of cross examination of V.K. Palta. The cross examination of witness itself shows that respondent has not committed any misconduct. Consequently, the issue is decided against the applicant/petitioner.

7. Keeping in view the above finding, the learned Counsel appearing for the Corporation contended that in view of the judgment in the case of **Delhi Transport Corporation vs. Sardar Singh, JT 2004 (6) SC 342** decided on 12th August, 2004, the case is squarely covered and the order of the Industrial Tribunal in rejecting the application of the management under Section 33(2)(b) of the Act needs to be quashed and the matter be remanded for further proceedings in accordance with law. On the other hand, the learned Counsel appearing for the workman stated that **Sardar Singh's** case (supra) itself carves out certain exceptions and the case of the petitioner squarely

falls in those exceptions as the leave of the petitioner was specifically sanctioned and as such the order of the Industrial Tribunal calls for no interference.

8. It will be appropriate to refer to the charge which was framed against the petitioner-workman. The charge reads as under:-

"Scrutiny of your service record for the period 1.1.91 to 30.6.91 revealed that you took leave without pay for 40 days from 1.1.91 to 30.6.91 out of which 5 days leave was unauthorisedly availed without sending any application or even intimation to the office. It is therefore clear that you have been careless towards your duties and towards corporation, violating the rules of the corporation and not taking interest in the works of the corporation.

Your this act constitutes misconduct under the provisions of Section 19 (f), 19 (h) and 19 (m) of the standing administrative order governing the conduct of DTC employees."

9. The charge can hardly stand the test of legal scrutiny in as much as the statement of AW1, V.K. Palta, the only witness examined by the Corporation clearly absolves the workman of the alleged charge. It is not a case where leave without pay was treated as sanctioned leave by deep

fiction of fact or law. In the present case admittedly, the workman had moved an application for 35 days out of 40 days of leave which was sanctioned by the competent authority. AW1 has stated that he was competent to sanction and he had sanctioned the leave of the workman for 40 days. Once the leave of the workman, after filing of the application was sanctioned by the competent authority, it is not possible to assume that this was misconduct on the part of the employee. Their Lordships of the Supreme Court while dealing with the case of **Sardar Singh's case (supra)**, held as under:-

"Habitual absence is a factor which establishes lack of interest in work. There cannot be any sweeping generalization. But at the same time some telltale features can be noticed and pressed into service to arrive at conclusions in the departmental proceedings.

Great emphasis was laid by learned counsel for the respondent-employee on the absence being treated as leave without pay. As was observed by this Court in *State of Madhya Pradesh v. Harihar Gopal* [1969 (3) SLR 274] by a three-judge Bench of this Court, even when an order is passed for treating absence as leave without pay after passing an order of termination that is for the purpose of maintaining correct record of service. The charge in that case was, as in the present case, absence without obtaining

15

leave in advance. The conduct of the employees in this case is nothing but irresponsible in extreme and can hardly be justified. The charge in this case was misconduct by absence. In view of the Governing Standing Orders unauthorized leave can be treated as misconduct.

Conclusions regarding negligence and lack of interest can be arrived at by looking into the period of absence, more particularly, when same is unauthorized. Burden is on the employee who claims that there was no negligence and/or lack of interest to establish it by placing relevant materials. Clause (ii) of Para 4 of the Standing Order shows the seriousness attached to habitual absence. In clause (i) thereof, there is requirement of prior permission. Only exception made is in case of sudden illness. There also conditions are stipulated, non-observance of which renders the absence unauthorized.

The Tribunal proceeded in all these cases on the basis as if the leave was sanctioned because of the noted leave without pay. Treating as leave without pay is not same as sanctioned or approved leave.

That being the factual position, the Tribunal was not justified in refusing to accord approval to the order of dismissal/removal as passed by the employer. The learned Single Judge was justified in holding that the employer was justified in passing order of termination/removal. The Division Bench unfortunately did not keep these aspects in view and reversed the view of learned Single Judge."

10. It is unambiguously clear from the above enunciated principles of law that the burden is on the employee to show it to the satisfaction of the Labour Court that there was no negligence or lack of interest on the part of the employee in his employment. The employee normally should place relevant material on record in support of such a plea. In the present case, the Tribunal has mainly proceeded on the basis that leave was sanctioned because of the noting recorded in the file of the employee (leave without pay). The workman had moved an application for grant of leave, which was sanctioned. In the face of complete admission by the competent authority who was examined as AW1, the workman was able to discharge the primary onus of burden to prove, placed upon him. The burden then, was shifted to the management to establish by documentary and oral evidence that workman was negligent but the management have produced no other evidence except examining AW1.

11. In addition to the above it can also be usefully noticed here that the order of the Tribunal holding the issue

of enquiry being just and fair against the Management has never been assailed by the Management, even in this writ petition. The Industrial Tribunal has held that there was no misconduct on the part of the employee. This finding of fact is based upon proper appreciation of evidence. The finding is not based upon mere recording of leave without pay, but, the leave applied for by the employee was duly sanctioned in terms of rules, as per the statement of AW1, the sanctioning authority. There is no dispute, even in these proceedings, to the fact that AW1 was the sanctioning authority and had, as a matter of fact, sanctioned the leave of the workman.

12. In view of the above reasoning I have no hesitation in holding that the order of the Industrial Tribunal dated 23rd October, 2002 does not call for any interference.

13. This further brings me to the discussion on the merits of the writ petition filed by the workman claiming enforcement of the order and the resultant reinstatement with full back wages with the respondent-Corporation. As far as the relief of reinstatement is concerned, the workman has already been taken back into service. He shall continue

has already been taken back into service. He shall continue in his employment. In relation to the back wages, there are no specific averments made in the petition that he was not employed during the interregnum period of dismissal of his service till the date of his reinstatement. Furthermore, it cannot be presumed that he is a person who was incapable of earning. Workman is admittedly a driver. Thus, in normal course of life he would be able to make his two ends meet. In these circumstances and keeping in view the judgment of this Court in **M.P. State Electricity Board vs. Smt. Jarina Bee, JT 2003 (5) SC 544**, it is not necessary for this Court to go into greater detail in relation to payment of back wages and particularly in view of the fact that there are no pleadings to the effect that workman was not able to get employment despite his best efforts. The relevant portion of the judgment in the case of **M.P. State Electricity Board (supra)** reads as under:

"Alternatively, it was submitted that full back wages are to be paid, considering the nature of the allegations and findings recorded by the labour court, industrial court and the High Court and the directions cannot be faulted on the facts of the case.

19

Para 5- In **PGI of Medical Education and research, Chandigarh Vs. Raj Kumar**, this Court found fault with the High court in setting aside the award of the labour court which restricted the back wages to 60% and directing payment of full back wages. It was observe thus :

"The labour court being the final court of facts came to a conclusion that payment of 60% wages would comply with the requirement of law. The finding of perversity or being erroneous or not in accordance with law shall have to be recorded with reasons in order to assail the finding of the tribunal or the labour court. It is not for the High court to go into the factual aspects of the matter and there is an existing limitation on the High Court to that effect".

Again at paragraph 12, this court observe:-

" Payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straight jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety."

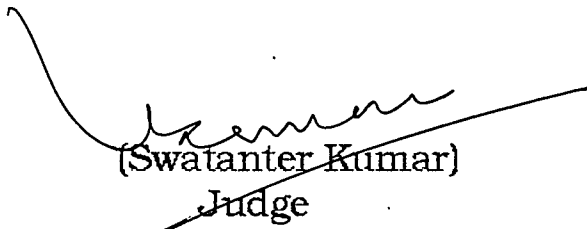
Para 6 - The position was reiterate in Hindustan Motors Ltd. Vs. Tapan Kumar Bhattacharya and Another and Indian Railway Construction Co. Ltd. Vs. Ajay Kumar.

Para 7- Applying the legal principles, the inevitable conclusion is that the High Court committed an error in holding that the award of full back wages was the natural consequence."

14. For the reasons afore-recorded, I allow this petition and direct the respondents to reinstate the workman with continuity of service with back wages, however restricted to 25% of the said wages for the interregnum period i.e. from the date of termination till reinstatement. I have restricted the back wages to 25%, keeping in view the absence of specific pleadings and normal conduct of the workman in the facts and circumstances of this case.

15. The writ petition is, accordingly, partially allowed while leaving the parties to bear their own costs.

October 11, 2004
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(Swatanter Kumar)
Judge

- Rf No. 207/05